



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 8, 1998

Ms. Sealy Hutchings
General Counsel
Office of Consumer Credit Commissioner
2601 N. Lamar Boulevard
Austin, Texas 78705

OR98-1610

Dear Ms. Hutchings:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116354.

The Office of the Consumer Credit Commissioner (the "commissioner") received a request for copies of the financial statements and annual reports for each office of the Western Shamrock Corporation, which is doing business as Western Finance. You submitted to this office for review representative samples of the documents at issue.¹ You assert that the annual reports are protected from disclosure pursuant to subchapter L of title 79 of Vernon's Texas Civil Statutes, in conjunction with section 552.101 of the Government Code.

We first address the Western Finance annual reports. Section 552.101 of the Government Code provides that information made confidential by law is excepted from public disclosure under the Open Records Act. Title 79 of Vernon's Texas Civil Statutes, article 5069-3A.909 provides for confidentiality of the annual reports:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Each year, not later than May 1, or a subsequent date set by the commissioner, an authorized lender shall file with the commissioner a report that contains relevant information required by the commissioner concerning the business and operations during the preceding calendar year for each office of the lender in this state where business is conducted under this chapter.

(b) A report under this article must be:

(1) under oath; and

(2) in the form prescribed by the commissioner.

(c) A report under this article is confidential.

(d) Annually the commissioner shall prepare and publish a consolidated analysis and recapitulation of reports filed under this article.

Thus, the commissioner may not release the Western Finance annual reports, which are confidential under article 5069-3A.909. We note that the annual report contains schedules that provide financial information about the company, which are confidential as part of the annual report.

You assert that the request seeking financial statements is too broad because it does not provide a time period for the reports. Section 552.222 of the Government Code provides that the governmental body may discuss with a requestor how the scope of a broad request might be narrowed. However, the governmental body must respond to even a broad request for information. In this situation, the request appears to be for all Western Finance financial reports held by the commissioner. *See* Open Records Decision No. 452 (1986) at 3 (open records request applies to information in existence when request is received).

Pursuant to section 552.305 of the Government Code, this office provided Western Shamrock Corporation ("Western Shamrock") with the opportunity to explain why the Western Finance financial statements are protected from disclosure. Western Shamrock asserts that the information at issue is protected from disclosure pursuant to sections 552.101, 552.107, 552.110, and 552.112 of the Government Code.

Western Shamrock indicates that the financial statements may be protected from disclosure under section 552.101 of the Government Code, in conjunction with section 342.502 of the Finance Code and article 5069-3A.902 of Vernon's Texas Civil Statutes. Section 552.101 provides that information must be withheld from disclosure if it is confidential pursuant to law. Both section 342.502 and article 5069-3A.902 make certain

information confidential when obtained during an examination or investigation. However, the commissioner's letter to this office states that the financial statements "were part of the application for regulated loan license" and thus the statements were not obtained during an examination or investigation.

Western Shamrock asserts that the requested financial statements are protected from disclosure under section 552.107(2) of the Government Code. Section 552.107(2) provides that information is excepted from disclosure if "a court by order has prohibited disclosure of the information." *See* Open Records Decision No. 415 (1984) at 2. Western Shamrock submitted a court order on a motion to compel production, which denied the motion in part but ordered that Western Shamrock provide 1996 audited financial statements for Western Finance. This is not, however, a court order prohibiting public disclosure of Western Finance's financial statements.

Western Shamrock also argues that the financial statements are protected from disclosure as trade secrets or financial information under section 552.110. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

While Western Shamrock asserts the applicability of section 552.110, it provides no argument showing how either prong of section 552.110 applies. Thus, this office has no basis on which to conclude that section 552.110 is applicable. Open Records Decision No. 363 (1983) (third party has duty to establish how and why exception protects particular information).

Western Shamrock further contends that section 552.112 protects the financial statements from disclosure. Section 552.112(a) provides that information is protected from disclosure "if it is information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Western Shamrock cites to Open Records Decision No. 446 (1986) in support of its assertion that section 552.112 is applicable. In

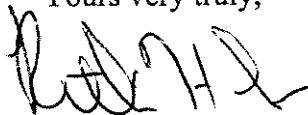
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- (1) the extent to which the information is known outside of [the company];
 - (2) the extent to which it is known by employees and others involved in [the company's] business;
 - (3) the extent of measures taken by [the company] to guard the secrecy of the information;
 - (4) the value of the information to [the company] and [its] competitors;
 - (5) the amount of effort or money expended by [the company] in developing the information;
 - (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Open Records Decision No. 446 (1986), this office reviewed provisions of the law governing financial information obtained from credit unions by the Commissioner of the Texas Credit Union Department, and the use made of that financial information, in determining that section 552.112 was applicable to the requested financial information. We note that in Open Records No. 28 (1974), which is cited in Open Records Decision No. 446 (1986), this office agreed that a credit union balance sheet on an annual report was protected under section 552.112. We note that in situations where this office has applied section 552.112, the governmental body argued the applicability of section 552.112 and provided information to show the applicability of section 552.112. Here, the commissioner does not assert that section 552.112 protects the requested financial statements.

Western Shamrock asserts that section 552.112 is applicable, but has not shown how section 552.112 applies to the requested financial statements which were submitted as part of an application. Because Western Shamrock has not shown that the financial statements are protected from disclosure under section 552.101, 552.107, 552.110, or 552.112, the financial statements must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 116354

Enclosures: Submitted documents

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(w/o enclosures)